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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 399

SOUTHERN RAILWAY COMPANY, Petitioner,

v.

OLIVIA COX LUNSFORD, Administratrix of the Estate of J. M. Cox, Deceased, Respondent.

BRIEF FOR RESPONDENT

REUBEN R. ARNOLD,
B. P. GAMBRELL,
T. D. ARNOLD,
Attorneys for Respondent.
Address: Atlanta, Ga.

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BRIEF FOR RESPONDENT

RESPONDENT MAKES A STATEMENT OF THE FACTS, NOT BEING SATISFIED WITH PETITIONER'S STATEMENT OF FACTS

In this brief we will call the railway company the defendant and the administratrix the plaintiff.

Cox was an engineer upon a passenger train running from Birmingham, Alabama, to Atlanta, Georgia. At a point in Georgia about one mile from Bremen, the front trucks of the engine left the track. Neither the engineer nor the fireman knew the trucks were off the track. The engine ran apparently with all wheels on the track, as far as the crew knew, for seven-tenths of a mile. All this time the wheels of the derailed front trucks had descended from the rail which was 6¾ inches high to the crossties and for the distance of seven-

tenths of a mile, as the marks showed, struck the ties at repeated intervals. After the engine had run approximately seven-tenths of a mile it struck a switch and the derailed front trucks coming in contact with the switch caused the derailment and overturning of the engine and the death of the engineer Cox. The administratrix of Cox brought this action to recover damages for his death.

The case was brought upon two theories—First, negligence in reference to the condition of the track, road-bed and right-of-way caused the initial derailment and not the small rock claimed by the defendant to have been placed thereon by a negro child; second, defendant had equipped its engines with an appliance known as a "watchman," which should have applied the air brake whenever the front trucks left the track and dropped down as far as 2½ inches or moved to one side 9 inches, and which should have stopped the train before the final derailment and wreck.

There was abundant evidence that the track was out of condition, that the ties were rotten, that they were insufficiently spiked at both the place where the original derailment occurred and where the second derailment occurred. We refer the court to the photographs on pages 103, 107, 108 and to the testimony of Lunsford on pages 56, 57 and 58 of the record.

There was evidence that the rock or sandstone alleged by defendant to have been put on the track by the little negro boy did not derail the engine. The witness Holcombe, on page 62, who got to the scene right after the wreck, testified that there was just a little pile of sand rock crushed on the rail, "no great sight, a small amount, I think there wasn't much more than two handfuls, I don't think there was."

The witness Goree, who was the fireman, testified on page 49 that the engine would crush such a rock without derailment; that he had often run over rocks and his engine was never derailed.

The witness H. A. Cox testified (record page 70) to the effect that he had picked a sand rock up near the place of this wreck; that Holcombe, the deputy sheriff, was along when he found the rock; that he had been a fireman for years; that he never had anything like that to derail trains; that he had run over rocks many times with trains; that when a rock is struck by an engine weighing 140 or 160 tons it would knock it off but if it hit it it would crush it, "That rock crushed up is almost the same as common sand. You sand the track to keep the engine from slipping when starting the train." (Record page 71.)

The Court of Appeals of Georgia in its opinion held that there was evidence to support the verdict on both counts of the petition, that is, on the defective track and road-bed and on the failure of the little watchman to function, the language of the Court of Appeals on page 163 being as follows:

> "There were two theories in the case, one of negligence and the other based on the safety-appliance laws, and the judge properly separated these theories and instructed the jury as to the same. None of the special assignments of error show any error as against the defendant. There was evidence tending to substantiate the plaintiff's case on both theories."

THE EVIDENCE SHOWED WITH REASONABLE CERTAINTY THAT ALL THE CONDITIONS WERE PRESENT WHICH WOULD HAVE MADE THE WATCHMAN FUNCTION WHEN THE FRONT TRUCKS LEFT THE TRACK—PROVIDED THE WATCHMAN WAS NOT OUT OF REPAIR.

It will be borne in mind that the "little watchman" simply applies the air brakes on the train by tripping a trigger which opens a valve in the air line when the front trucks leave the track. There is no difference between the way the watchman

applies the air brake and the way the engineer applies it from his seat in the cab.

There is no complaint of error here except that the judge submitted to the jury the question as to whether the watchman was in proper condition as required by the Locomotive Inspection Act.

That the evidence supported the theory that the watchman should have applied the air, and did not apply it, and that had it functioned the train would have stopped in two hundred yards after the initial derailment (whereas the train ran seven-tenths of a mile) is shown by the testimony of Goree, who testified on page 48 that if the air had been applied at the initial derailment the train would have stopped in fifteen car lengths of forty feet to the car, which would make six hundred feet or two hundred yards; by the testimony of Lunsford that beginning with the initial point of derailment throughout the entire seven-tenths of a mile, the wheels of the front trucks dropped down from the top of the rail to the cross-ties where marks were made by both of the wheels on many of the ties (Lunsford, pages 55, 56 and 57); by the testimony of Holcombe to the effect that the rail was 6¾ inches high (record page 63), that the mark of the flanges of the front wheels began at the point of derailment opposite the negro church (record page 62) and that the mark of the front wheels on both sides was on the cross-ties from the point of initial derailment to the final turnover (showing as a physical fact that the trucks had dropped 6¾ inches and allowing one inch for the flange had dropped a net distance of 5¾ inches).

It was shown by the fireman Goree and by all the train crew, Davis and Dowdle, that no brake was put on at the initial derailment or during the seven-tenths of a mile when the engine was running on the track with the front wheels off (see Davis, conductor, page 87, and Dowdle, baggage man, page 89 of the record). Goree, the fireman, said at the final

turnover, after the engine had run with the trucks off for seven-tenths of a mile, the engineer, when the entire engine got off the rails and headed in on the sidetrack, which was the time of the final turnover, put on his air brakes (record p. 47). Neither the engineer nor fireman had discovered, or could discover, the first derailment of the trucks, as the engine was running apparently normally.

We have already quoted the evidence of Holcombe and Lunsford to the effect that beginning at the point of derailment the flanges of the front wheels hit the same cross-tie in numbers of instances between the point of initial derailment and the point of final derailment. The front wheels on both sides could not have hit the same tie without having dropped 6¾ inches, the height of the rail. The first mark of the flanges on the ties was on the first three ties after the derailment, then on the seventh tie, then on the eighth tie, then on the ninth tie, the tenth, the eleventh, then on six ties from twelve to eighteen on both sides, and so on all the distance (record p. 62, 63). Not only this, but the mark of the left flange inside the rail at one place was eighteen inches from the rail (record p. 63). This not only showed that the wheels had dropped the height of the rail but also that they had moved to one side eighteen inches. Either proposition would have set the brake because the frame was only five inches high, and even if the trigger had not been exactly in the middle of the frame (as it should have been, according to Master Mechanic Goff), to drop 6¾ inches would have applied it, and as the frame was only eighteen inches wide a movement out laterally or to one side of eighteen inches from the rail, supposing the rod to have been somewhere near the middle of the frame, would have easily applied the brake. The frame was 18 inches wide, 5 inches high, and the trigger projected through the center of the frame.

So far as the curvature of the track is concerned as affecting the application of the brake, we call attention to the diagram of the track (page 99 of record) which shows that from

the first point of derailment there was a straight stretch of approximately two-thirds of 1350 feet which left no excuse for the watchman to fail to operate if in good condition. On straight track there must be a sheer drop under the laws of gravity when the truck first falls and this truck fell the height of the rail which was 6¾ inches above the tie. No more perfect condition for applying this watchman can be conceived of than a straight track. There is no swaying motion of the engine as in case of a curve which Goff, the master mechanic, claimed might have some effect upon the trigger. After the first derailment there was approximately a straight stretch, then a curve of 6 degrees to the left, then several hundred feet further on another curve of 6 degrees and 10 minutes to the right, then there followed a practically straight stretch of 1400 feet before the final derailment.

The undisputed evidence of Goree, as herein quoted, showed that the train, if the brake had been applied, should have stopped in 600 feet. The only suggestion made as to the creation of conditions which might render doubtful the application of the little watchman were curves. Here we have for seven-tenths of a mile many degrees of curvature, as well as several hundred feet of straight track and in one place 1400 continuous feet of straight track. Straight track would cause a sheer drop of the frame of the front truck which would apply the trigger. The truck necessarily had to drop straight down in the first instance. The center pin on the engine extended 3 inches into the truck and if the truck dropped it had to make a sheer drop of at least 3 inches and then the chains attached to the front end of the truck allowing for a little play would prevent it going back any material distance. (See Goree, record pages 75, 76.)

The court left very fairly to the jury the question as to whether the conditions were present which should have made the watchman apply. The plaintiff proved those conditions with mathematical certainty. It was admitted by the defendant's master mechanic Goff that with those conditions ex-

isting the watchman must have applied. It is true, after testifying on his direct examination that the watchman would have applied under those given conditions, that on the cross examination the master mechanic was somewhat vague, indefinite and evasive in his answers, but the true construction of his testimony was for the jury.

Goff's depositions were taken by the plaintiff. He was the defendant's master mechanic and the record shows that his conclusions were all favorable to his employer but the facts he stated and indeed the photographs and drawings of the little watchman made its application here so simple that the jury would have been compelled to draw their own conclusion that it would have applied in this derailment if it had been in good condition.

It is a matter of common knowledge that any such appliance could be out of condition. The valve could have stuck, the air pressure might have been insufficient to apply the brakes, the trigger might have been broken, the frame which sat on the front trucks might have been bent or even broken, and many other things might have put it out of condition.

We refer to our brief on file in opposition to the writ of certiorari as showing by Goff that the watchman should have applied the brake under the conditions here proved. See pages 5, 6, 7, and 8 of that brief. Also Goff's evidence in record pages 77, 80, 81, 82, and 86. See drawings and photographs of watchman on pages 109, 110, 111, 112, 117 and 118 of record.

Goff testified on page 77 of the record:

> "Whatever the height of that rail is, when those trucks get off, that wheel would drop to the tie or the ballast, one or the other."

We call attention of the court to the photographs of the watchman in the record on pages 109, 110, 111 and 112.

The apparatus is very simple. It merely depends upon the fall of the truck carrying down the frame in which is placed a trigger connecting with the air line. It applies the air exactly like the engineer applies the air from the cab.

Goff testified on pages 80 and 81:

> "As to there being any way to keep it from operating if the framework comes in contact with the trigger, from the construction of the valve, it would appear that it would have to work. It would operate, of course, to set the brakes."

We say that the foregoing testimony of the defendant's master mechanic Goff fits the exact facts of the instant case. It does not profit us to consider his vague answers on cross examination to the effect that the matter was in an experimental stage and that sometimes the device would set the brakes even when the conditions were not present which called for it. So far from this being in the defendant's favor, it is against the defendant. The general trend of this vague testimony on the part of Goff, as see page 86 of the record, is:

> "I might say that we have had some delays to trains on account of this device setting, and that would then involve the necessity of increasing the size of the framework."

There does not seem to have been any complaint by the master mechanic on his cross examination that the brakes did not set in every instance where they should, but that often they would set when they should not. This is to err on the side of safety and does not benefit the defendant.

On p. 86 record Goff said appliance was not perfect; that it had to be adjusted to the curvature of the track; that there had been some delay to trains on account of "this device setting;" that "this involved necessity of increasing size of frame work."

It is thus manifest that the size of the frame is adjusted to meet the curves. One or more experiments on the most extreme curves would show the size of the frame required to avoid unnecessary settings, and curves only affect the lateral movement of the frame and trigger. The up and down—vertical — movement of the frame depends on the height of the rail. If the ballast and ties are level the frame is bound to drop the height of the rail. As herein stated, Goff admitted this.

THE DEFENDANT NEVER PRETENDED TO EXPLAIN WHY THIS WATCHMAN DID NOT FUNCTION; THE DEFENDANT HAD IT EXAMINED AFTER THE WRECK BUT NEITHER THE WITNESS MAKING THE EXAMINATION AND INDEED NO OTHER WITNESS MADE ANY EXPLANATION WHATEVER OF WHETHER IT WAS IN FUNCTIONING CONDITION; THE INFERENCE WAS OVERWHELMING THAT THE WATCHMAN WAS OUT OF CONDITION AND THAT THAT MUST HAVE BEEN THE REASON WHY THE DEFENDANT MADE NO EXPLANATION OF ITS CONDITION.

The superintendent Madden showed in his statement, beginning on page 93 and on page 94 thereof (see record) that he went immediately to the scene of this wreck, arriving the same afternoon, and made an inspection. He tells on pages 95 and 96 of examining the locomotive. He said there was an attachment on the engine known as Wright's little watchman. He did not say one word about the condition that that little watchman was found to be in on this engine. He was strangely silent on that subject. The master mechanic Goff came to the scene of this wreck the same day and took the watchman off and testified as follows on page 82:

> "I did not test this watchman after I took it off; I understand that Mr. Stewart, the superintendent of motive power, had it tested; I don't know it; I know they told me they did test it, that is all I know about that part

of it. When I got there, the truck, as I say, was all laying over there; the truck part of it was all disconnected from the watchman part of it, from the trigger part; naturally, it would be. The trigger part of it, and the air pipe to the train line, had been taken off; Mr. Stewart had it taken off. It had been taken off when I got there; he had it taken off for the purpose, I understood, of having it tested."

And yet we have not a word in this record from Stewart, the superintendent of motive power, or anyone else on behalf of the defendant as to what condition this watchman was in. Why talk vaguely about whether the watchman on other occasions had functioned when it should not have functioned, when the defendant's agent had the watchman for a test, undoubtedly made the test, and did not show the court whether it was in condition or out of condition? The conclusion therefore is irresistible that the watchman must have been out of condition.

IN HIS CHARGE TO THE JURY THE JUDGE FAIRLY SUBMITTED THE DEFENDANT'S LIABILITY UNDER BOTH THEORIES, THAT IS, UNDER THE FIRST COUNT TO THE EFFECT THAT THE TRACK AND ROAD-BED WERE OUT OF CONDITION, AND THEN UNDER THE THEORY SET UP IN THE SECOND COUNT THAT THE LOCOMOTIVE INSPECTION ACT HAD BEEN VIOLATED BY FAILURE TO KEEP THE WATCHMAN IN PROPER CONDITION.

The defendant in the trial did not undertake to dispute the proof of the conditions which should have made the little watchman function. The defendant's answer was that the little watchman was an experiment. No jury could have misunderstood the issue as made by this evidence which was that the facts existed which would have made the watchman function if it had been in proper condition.

The judge charged the jury on page 150,—

> " . . . and if the same (watchman) did fail to function and operate, and if its failure to so operate, because it was not maintained in good condition, was the proximate cause of the death of Mr. Cox, then the plaintiff could recover in this case."

Again on pages 150 and 151 the court charged,—

> " . . . and if you believe that had it been in proper condition and safe to operate in the service to which the same was put that it would have caused the valve to trip when the front trucks became derailed, and that had it functioned the train would have been stopped by applying the brakes before it finally became derailed, and if you believe that the failure of this watchman to properly operate was due to the fact that it was not in proper condition and safe to operate in the service to which it was put, and that if it had operated the train would have been stopped and the decedent's life would have been saved," etc., then the defendant would have been liable.

In other words, the jury understood fully that the defendant would not be liable unless this was a case in which the watchman should have operated, and that its liability depended upon whether its failure to operate was due to the fact that it was not in proper condition.

The railway could have made its argument to the jury that under the facts of this case the watchman would not have applied even if in good condition. That question was left open as a question of fact under the judge's charge. The judge put the right to recover under the second count upon the proposition that the failure of the watchman to operate was because it was not maintained in good condition.

DEFENDANT SET UP IN ITS ANSWER THAT WATCHMAN WAS AN EXPERIMENTAL DEVICE DESIGNED UNDER CERTAIN CONDITIONS TO APPLY THE BRAKE; THAT THE SAME WAS IN GOOD CONDITION BUT PROPER CONDITIONS DID NOT DEVELOP TO CAUSE TRIPPING THE VALVE; JUDGE CHARGED JURY ON DEFENDANT'S CONTENTION THAT IF WATCHMAN WAS ONLY AN EXPERIMENT AND WAS NOT INTENDED TO BE A PERMANENT PART OF THE LOCOMOTIVE SO AS TO AUTHORIZE EMPLOYEES TO RELY ON THE WORKING AND OPERATION OF IT THAT ITS FAILURE TO WORK OR PERFORM ITS FUNCTIONS COULD NOT BE CHARGED AGAINST DEFENDANT AS NEGLIGENCE AND IT WOULD NOT BE LIABLE FOR FAILURE ON PART OF DEVICE TO OPERATE PROPERLY; WE CONTEND THAT THIS CHARGE GAVE DEFENDANT THE BENEFIT OF EVERY QUESTION OF FACT IT HAD ANY RIGHT TO RELY ON AND THAT THE CHARGE WAS TOO FAVORABLE TO DEFENDANT RAILWAY.

The defendant raised the issue of fact as to whether the conditions developed which called for functioning on part of this watchman. The defendant's answer (record pages 20, 21) claims that the watchman was so designed that under certain conditions "the derailment of the front truck wheels would trip a valve and thereby apply the air on the brakes of the train. It says that the same was in good condition on said engine at the time, but apparently the proper conditions did not develop which would cause tripping of said valve and the application of said brake. It says that the same is merely an experimental device, which will not operate at all times when said truck wheels leave the track, but will operate only when conditions develop which will trip the same."

Here was a clear recognition that there are conditions which will trip the valve. These are physical conditions and

the same were abundantly proved as hereinbefore set forth. If there were any conditions other than those proved by the evidence of the plaintiff, the defendant should have proved such conditions. Only by the cross-examination of the witness Goff to which only vague answers giving no details as to conditions,—did the defendant make any effort to prove the conditions which existed as to the front trucks.

No decision of which we are aware has allowed a carrier to claim that a safety device placed on all of its passenger engines and on a majority of all of its engines and which has been used by the defendant from five to seven years should not be kept in good condition merely because it is an experiment. Whether an experiment or not an experiment, it is on the engine and is a part and appurtenance thereof and the engine is doing the work of the carrier hauling passengers, and employees know it is on the engine and have a right to rely on it.

Undoubtedly the watchman was a physical part of the engine. The air brake line extended into the engine and this watchman with the trigger which opened the valve was as much a part of the engine as that part of the air brake line which sat in the engineer's cab and which the engineer applied. It was the same thing in principle. It gave the engine a degree of safety which an engine which did not have that appliance did not possess. The degree of safety which an engine possesses depends upon the type of that particular engine, and the type of that particular engine depends upon what the particular railroad desires it to be. The law does not require it to have any particular type of engine, unless the Interstate Commerce Commission has investigated and condemned a particular part of an engine which the railway puts on it and substituted another, and as long as the railway is allowed unmolested to add any particular parts to an engine or to use any particular type of engine, that particular part and that particular type of engine must be in good condition and must function properly.

We say that none of the decisions have recognized the contention that when an engine is out on the road running and hauling passengers, that any part of that engine placed thereon by the defendant for use in actual transportation can be called an experiment. Experiments should be conducted otherwise.

Again we refer to the master mechanic Goff who testified on page 78 of the record that the watchman had been used by the defendant five, six or seven years; that on this particular division it was used on the majority of engines; that this particular engine was equipped with it; that the company had been putting this appliance on the engines gradually; that all the passenger engines on this division were equipped with this appliance; that the railroad at one time quit using them but then started to putting them on again and had been increasing them ever since. (See Goff's redirect examination, pages 86 and 87.)

Certainly a mere conclusion of a witness that an appliance was an experiment in the face of such specific testimony as this would have raised a jury question and would have required the jury to find that this appliance was no experiment but had become a regular operating part of this engine.

An experiment should not be used in the transaction of the company's regular business. An experiment would hardly be used five to seven years. An experiment would hardly be used on every engine every day for at least five years in passenger traffic which was carrying on defendant's business. But as the defendant had made this claim that this appliance was an experiment, the judge submitted that issue to the jury as a question of fact, and the intimation of the Georgia Court of Appeals was that this was certainly not error against the defendant, implying that it was error in favor of the defendant. The judge in his charge gave the jury the benefit of the defendant's answer setting up this experiment contention, in the following language:

"The defendant contends that the device known as Wright's Little Watchman is really in an experimental state, that it was in use at the time as an experiment only, that it was not perfected, that it would work sometimes and at other times it would not, and therefore it was not used as a permanent part of the locomotive. I charge you on this question that if you find from the evidence (and that is purely a question for you) that this device known as Wright's Little Watchman had not been in general use on this road, or on other roads, for a sufficient length of time to be a fixed and permanent and reliable device for the purpose for which it was used, and that its use, as contended, was simply an experiment, and this limited or experimental use was such that the decedent did not and was not authorized as a reasonably prudent man to rely on the working and operation of this device at this particular time, then in that event the failure of this device to work or to perform its functions would not be charged against the defendant as negligence, and the defendant would not be liable for a failure on the part of this device to operate properly."

Defendant does not except to the manner in which this contention of experiment was submitted by the judge to the jury, but only contends in the petition for certiorari (p. 12 record), "There was no justification for submitting this question of fact to the jury, since all the evidence showed without dispute that the device was experimental and was not a device in general use." We have shown herein that the word "experimental" was a mere conclusion by interested witnesses; that the facts showed it had passed the experimental stage; that it was a part of defendant's passenger engine equipment, and whether other carriers used it or not, that it was a part and appurtenance of all defendant's passenger engines, and was used in their regular service, and had been for several years.

SAFETY APPLIANCE ACT APPLIES TO EVERY PART AND APPURTENANCE OF LOCOMOTIVE, BOILER AND TENDER AND REQUIRES THE SAME TO BE IN PROPER CONDITION; DEFENDANT'S CONTENTION THAT LOCOMOTIVE INSPECTION ACT DOES NOT APPLY TO WATCHMAN ANSWERED; LOCOMOTIVE INSPECTION ACT DISCUSSED AND NOTHING IN THE ACT OR IN THE RULES OF THE INTERSTATE COMMERCE COMMISSION OR IN ANY DECISION OF ANY COURT APPLY THE REQUIREMENT THAT ALL PARTS AND APPURTENANCES OF LOCOMOTIVE, BOILER AND TENDER BE KEPT IN PROPER CONDITION TO ANYTHING LESS THAN ALL PARTS AND APPURTENANCES WHICH ARE ACTUALLY ON ANY LOCOMOTIVE OPERATED BY A CARRIER.

The original boiler inspection act applied only to the boiler and appurtenances. (See Act February 17, 1911, c. 103, sec. 2, 36 Stat. 913.)

The amendment of 1915 applied the act to the entire locomotive, its boiler, tender, and all parts and appurtenances thereof. (See c. 169, sec. 1, 38 Stat. 1192.)

The final amendment was the act of 1924, c. 355, 43 Stat. 659.

All are contained in U.S.C.A., Title 45, from section 22 through section 34, and we will discuss them as so contained in U.S.C.A., pages 78 to 88.

The essential part of the act is section 23 of U.S.C.A. which reads:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in

> the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The other sections provide for appointment of inspectors, for the details of inspection, and for the making of rules.

Without going into the details of construction, we will quote three cases from the Supreme Court of the United States which deal with the power of the Commission and the character of the duty to keep the entire locomotive in proper condition.

In B. & O. v. Groeger, 266 U. S. 521, the court said that the duty to keep the locomotive and all parts and appurtenances in proper condition and safe to operate "prescribes a sufficiently definite standard of duty;" that the carrier's duty as to safety is absolute and continuing; that the carrier is liable for failure to comply with his duty, whether it had notice, actual or constructive, that the part was unsafe or defective. The court in this case also laid down this rule:

> "It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders and appurtenances are to be kept in proper condition."

The court in this case held that the law did not require a fusible plug to be placed in the boiler head and that the trial judge committed error in practically so charging. To compare that case to the case at bar, we say that if the defendant had constructed the engine in the Groeger case with a fusible

plug actually in it that then the defendant under the direct terms of the act of Congress would have been required to keep the fusible plug in proper condition, whether the plug was required by a rule of the commission or not. It would have been actually a "part and appurtenance" of the engine.

In the case of Napier v. Atlantic etc. Co., 272 U. S. 605, the Georgia statute undertaking to regulate certain appliances on locomotives of interstate railways was held void, because the boiler inspection act as amended has so occupied the field of regulating locomotive equipment on interstate highways that state legislation requiring cab curtains and other things is precluded, and such matters are left to the regulatory power reposed by that act in the Interstate Commerce Commission. The court said that previously (quoting, among other cases, the case of B. & O. v. Groeger, supra) the question of whether the act gave the commission power to specify equipment for locomotives was left open, but the court decided:

> "We think that power was conferred. The duty of the Commission is not merely to inspect. It is also to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not in proper condition for operation."

Further on the court said, in response to the argument that the power of the Commission "has been exerted only in respect to minor changes or additions," as follows:

> "The fact that the Commission has not seen fit to exercise its authority to the full extent conferred has no bearing upon the construction of the Act delegating the power."

Further, the court said:

> "From time to time since the passage of the original Act, the Commission has required that locomotives used

> in interstate commerce be equipped with various devices"

and in a footnote on page 609 quoted various things covered by rules of the Commission, such as steam gauge, safety valves, water glass and gauge cocks, shut-off and drain cocks, shields on water and lubricator glasses.

In United States v. B. & O. Co., 293 U. S. 454, the court held that the Commission could adopt a rule requiring carriers to substitute power for hand operated reversing gear if the latter is found to make the engine unsafe or to subject employees or others to unnecessary peril of life or limb. It also held, in response to the argument that only the carrier could initiate the rules and that the Commission could only modify them, that the Commission's power was not limited to modifying the rules filed by the carrier or disapproving them, but, to use the court's language on page 461:

> "But the responsibility for rules adequate to insure safety was imposed by Congress upon the Commission; and to discharge that duty, it was essential that the Commission, also, should possess the initiative in rule making. To this end, it was granted the power, not only of disapproving proposed rules, but also of requiring modifications of those in force."

The court had previously quoted section 5 of the original act to the effect that each carrier should file its rules and instructions for inspection with the chief inspector, and that after hearing and approval by the Commission, such rules, with such modifications as the Commission requires, should become obligatory on the carrier.

RULES OF COMMISSION QUOTED AND DISCUSSED AND THE COMMISSION IN PROVIDING FOR SPECIFIC DEVICES OR OTHER CONSTRUCTION CHARACTERIZES ITS RULES AS ONLY THE MINIMUM REQUIREMENTS UNDER THE ACT; THESE RULES ENCOURAGE THE CARRIER TO ENFORCE ADDITIONAL RULES NOT INCONSISTENT WITH THE COMMISSION'S RULES TENDING TO A GREATER DEGREE OF PRECAUTION AGAINST ACCIDENTS; THESE RULES PROVIDE FOR MANY AUTOMATIC DEVICES ON RAILWAYS WHICH FUNCTION ONLY WHEN SOME PARTICULAR CONDITION ARISES; THESE RULES HOLD THE CARRIER RESPONSIBLE FOR THE GENERAL CONSTRUCTION AND MAINTENANCE OF THE LOCOMOTIVE AND HOLD THE RAILWAY'S MECHANICAL OFFICER RESPONSIBLE FOR INSPECTION AND REPAIR "OF ALL PARTS OF LOCOMOTIVES AND TENDERS UNDER HIS JURISDICTION;" THESE RULES REQUIRE THAT EACH LOCOMOTIVE SHALL BE INSPECTED BY THE CARRIER'S AGENTS AFTER EACH TRIP OR DAY'S WORK; THE ACT ITSELF REQUIRES DISTRICT INSPECTORS TO MAKE PERSONAL INSPECTIONS FROM TIME TO TIME TO CARRY OUT THE PROVISIONS OF THE STATUTE AND VARIOUS OTHER PROVISIONS ARE REFERRED TO SHOWING THAT EVEN THOUGH THIS PARTICULAR DEVICE, THE WATCHMAN, HAD NOT BEEN REQUIRED OR REFERRED TO BY NAME THAT THE GENERAL RULES AS TO KEEPING IN REPAIR AND INSPECTING PROMULGATED BY THE COMMISSION COVERED IT AS WELL AS EVERY OTHER PART OF THE LOCOMOTIVE.

Rules of the Commission, of which this court will take judicial cognizance (See Caha v. United States, 152 U. S. 211; Casarello v. United States, 271 Fed. 486; and also Napier

v. A. C. L., 272 U. S. on page 609 quoting various rules of the Commission), printed by United States Government Printing Office in 1931, contain rules and instructions for inspection and construction in many particulars, most of which are unnecessary here to discuss. On page 46, as to rules for inspecting and testing boilers and appurtenances, the following language is used:

> "The railroad company will be held responsible for the general design and construction of the locomotive boilers under its control."

Under the head of Rules for Testing Locomotives and Tenders, rules 101, 102, and 103 on page 60 provide as follows:

> "101. The railroad company will be held responsible for the general design, construction, and maintenance of locomotives and tenders under its control.
>
> "102. The mechanical officer in charge, at each point where repairs are made, will be held responsible for the inspection and repair of all parts of locomotives and tenders under his jurisdiction. He must know that inspections are made as required and that the defects are properly repaired before the locomotive is returned to service.
>
> "103. The term 'inspector' as used in these rules and instructions means, unless otherwise specified, the railroad company's inspector."

The order of the Commission found on page 17 of the rules, after reciting the power of the Commission and the fact that the carriers had filed their rules and the fact that the rules prepared by the chief inspector had been submitted to the Commission, concluded with this language:

> "It is ordered, That said rules and instructions for the inspection and testing of locomotive boilers and their appurtenances, as follows, be, and the same are hereby, approved, and from and after the 1st day of July, 1911,

shall be observed by each and every common carrier subject to the provisions of the act of Congress aforesaid as the minimum requirements: Provided, That nothing herein contained shall be construed as prohibiting any carrier from enforcing additional rules and instructions not inconsistent with the foregoing, tending to a greater degree of precaution against accidents."

The foregoing order was dated June 2, 1911, after the passage of the act requiring inspection of boilers and their parts only. After the act of 1915 extending the boiler inspection act to the locomotive tender and all parts and appurtenances, the Commission passed an order on October 11, 1915, reciting the submission of rules and instructions to the Commission and concluding on pages 24 and 25 as follows:

"It is ordered, That the said rules and instructions for the inspection of locomotives and tenders and all their parts, as follows, be, and the same are hereby, approved, and from and after the 1st day of January, 1916, shall be observed by each and every common carrier subject to the provisions of the act of Congress aforesaid as the minimum requirements: Provided, That nothing herein contained shall be construed as prohibiting any carrier from enforcing additional rules and instructions not inconsistent with the foregoing, tending to a greater degree of precaution against accidents."

The rules promulgated by the Commission recognize and require many automatic devices which work under certain conditions, such as the steam gauge, on page 53, which correctly indicates the working pressure of the steam; the safety valve covered by rule 34, on page 53, providing that every boiler shall have two safety valves the capacity of which shall prevent, under any conditions of service, an accumulation of pressure more than 5% above the allowed steam pressure; and rule 35, which provides that safety valves shall be set to pop off at pressure not exceeding six pounds above the

working steam pressure; and rule 37, on page 54, which requires boilers to be equipped with water glasses and gauge cocks showing the condition of the water; and rule 41, on page 55, which requires all water glasses and lubricator glasses to be equipped with a safe shield which will prevent the glass from flying in case of breakage. We call attention to only a few of the safety devices referred to.

Beginning on page 60, many parts of the locomotive, including the brake system, are dealt with, and on page 61 it is provided as follows:

> "It must be known before each trip that the brakes on locomotive and tender are in safe and suitable condition for service; that the air compressor or compressors are in condition to provide an ample supply of air for the service in which the locomotive is put; that the devices for regulating all pressures are properly performing their functions; that the brake valves work properly in all positions; and that the water has been drained from the air-brake system."

It will be noted that the above rule generally requires that the air compressors are in condition to provide an ample supply of air for the service to which the locomotive is put; that the devices for regulating pressures are properly functioning; that the brake valves work *in all positions*. This very language would cover the valve in the little watchman in this case, as it was one of the valves used to apply the brakes. This requirement of air pressure would apply to the pressure in that part of the air line connected with the little watchman without any further specification, as this language applies practically to everything pertaining to brakes on the locomotive.

We call attention to rule 101 which provides that the railway is responsible for the general construction and maintenance of the locomotive and that the railway's mechanical officer will be held responsible for the inspection and repair "of all parts of locomotives and tenders under his jurisdic-

tion." This is not confined merely to the parts as to which the Commission has made specific orders. It covers all the parts, just as rule 101 covered all construction on the locomotive.

So we see that by general language the Commission has assumed its jurisdiction of inspection over every part of the locomotive, whether specifically named or not.

The Commission's rules as to specific parts are only the minimum requirements. The act of Congress requiring all parts and appurtenances to be in proper condition are the maximum requirements.

NOTHING IN LOCOMOTIVE ACT LIMITS REQUIREMENT OF "PROPER" PARTS TO LESS THAN ALL PARTS OF LOCOMOTIVE; NO DECIDED CASE LIMITS REQUIREMENT OF KEEPING PARTS "IN PROPER CONDITION" TO THOSE COMMISSION HAS REQUIRED TO BE PUT ON ENGINE.

Many cases have dealt with the words used in Section 23 in requiring that as to the locomotive and tender and all parts and appurtenances thereof the same must be "in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb."

We quote in this brief a great many cases which show that no court has ever sustained the contention that the commission must act in reference to some particular part or appurtenance before the condition of safety generally required must be maintained. We find only two cases in which a somewhat similar contention seems to have been made as to safety appliances on cars, and one is Illinois, etc., Rwy. v. Williams, 242 U. S. 462, and the other is the case quoted by the defendant in 37 Ga. App. 570, both of which deny this contention as we show herein later in this brief.

There is nothing in either section 23 or in the rules adopted by the commission that limits inspection to those parts or appurtenances required and specified by dimensions and other descriptions in the rules of the commission. On the contrary, the inspection required by the commission is made largely by the employees of the carrier, and, as section 102, on page 60, provides, the mechanical officer in charge, who is the company's inspector, will be held responsible for the inspection and repair of all parts of locomotives and tenders under his jurisdiction.

Section 29, on page 85, of 45 U. S. C. A., requires each government district inspector to make such personal inspection of the locomotive boilers under his care from time to time as may be necessary to carry out the provisions of this statute, but he is not required to make such inspections at stated times or at regular intervals. It is further provided by this section that each carrier shall file with the inspector in charge, under the oath of the proper officer of the company, a duplicate of the report of each inspection required by the rules and regulations and also showing the repair of defects disclosed by inspection.

Rule 104, on page 60, provides: "Each locomotive and tender shall be inspected after each trip, or day's work, and the defects found reported on an approved form to the proper representative of the company." Then follow details as to what this report shall show and the report is required to be filed in the office of the railroad company at the place where the inspection is made.

We thus see that Rule 101 having provided that the railroad company is held responsible for the design, construction and maintenance of the locomotive, and Rule 102 having required that the carrier's officer in charge is held responsible for the inspection and repair "of all parts of locomotives and tenders under his jurisdiction," and Rule 104, providing for an inspection of each locomotive after each trip or day's work,—the scope and character of these requirements would

cover every defect found in any part of the locomotive and is not by any means restricted to those parts which may have been mentioned by name in some rule or specification of the commission.

A particular part of the locomotive can be as well described in a general way as in a specific way, and the commission was assuming full jurisdiction of every part of the locomotive for the purpose of inspection and repair by these wide and sweeping rules; but even if it had not in this way taken full jurisdiction of all parts of the locomotive it had the power to do so, and having the power to do so, whatever is placed on the locomotive by the carrier is necessarily with the permission or implied sanction of the commission and is thus covered by the scope of the act.

But as argued in this brief, even if the commission had taken no jurisdiction of these parts, and even if it had not had power to cover all the parts of the locomotive, it should be held, in such a situation, that there are two separate and independent parts to this enactment, one covering all parts of the locomotive and tender for purposes of keeping in proper condition and the other covering such parts of the locomotive as the commission takes jurisdiction of for purposes of regulating, inspecting and testing.

ALL DEFENDANT'S CONTENTIONS IN ITS PETITION FOR CERTIORARI ARE TAKEN UP ONE BY ONE AND ANSWERED.

FIRST CONTENTION IS THAT WATCHMAN IS UNRELIABLE AND WILL ONLY OPERATE UNDER CERTAIN FAVORABLE CONDITIONS; WE SAY THE PROOF SHOWS THESE CONDITIONS EXISTED AND REFER TO THE PORTIONS OF THE EVIDENCE WHICH SO SHOW.

The essence of the carrier's contention begins on page 13 of the petition for certiorari.

The first ground on page 13 is that the undisputed evidence shows that the watchman will only operate when conditions develop that will bring the bracket in contact with the trigger, that actual experience has shown that sometimes it will operate and sometimes it will not, that occasionally it will stop a train when the trucks are not derailed. It is not specifically claimed that the conditions did not develop which should have caused it to operate.

In addition to our previous discussion on this subject we say: It was a question of fact for the jury as to what this appliance would have done, if in proper condition, under the facts of this case. The operation of it depended upon the simplest principles. The fact that it was an automatic device cuts no figure as many things about locomotives and all other machinery are as automatic as this appliance.

Goff was the defendant's master mechanic and was brought before a commissioner by the plaintiff. He was an interested witness in every way for the railway company. We have quoted his evidence in our brief to show that under the facts of this case the appliance must have worked. The jury would know that fact without the evidence of any witness. Detailed drawings of this appliance were in evidence showing how it worked. Full photographs of the appliance were in proof which showed that it worked by tripping a trigger upon a mere fall of the front trucks.

The facts of this case were gone into in great detail showing the height of the rail, the numerous places where both the right and left front wheels struck the same rail and showing the distance the truck must have fallen. The circumstantial evidence indeed showed that that trigger would have been pulled down from 3 to 5 inches by the downward motion of the trucks and moved 9 inches by the lateral or side motion of the trucks.

Certainly this evidence was abundantly sufficient to justify the jury in finding that if the valve had not stuck or the pipe

line clogged up in some way, or the air-pressure been weak or the trigger broken or bent, or something out of condition about the apparatus, it must have worked.

Goff, the master mechanic, testified that Stewart, the superintendent of motive power of the railway company, took the apparatus away with him after the wreck and had it tested. Yet none of the results of that test were made known to the court. Stewart was not a witness and it was not in any way explained that the test showed the apparatus to have been in functioning condition.

Stress is laid upon the fact in opposing counsel's brief that a little negro boy testified that he put a rock on the track to see it mashed and that in a few feet after passing over it the front wheels of the locomotive left the track. It was for the jury to say whether this child was telling the truth. Even if this rock had been placed on the track by this child, and even if it caused the derailment (which is improbable, as see our discussion of that subject in the brief), it was this very condition of the front trucks being derailed that the little watchman was designed to render harmless. This device would operate only in case of the derailment of the front trucks. We have the most unusual case of the engine running seven-tenths of a mile with the front trucks off bumping on the cross-ties, and within that seven-tenths of a mile subjecting the watchman to every conceivable test, both on curves, on straight track and over crossings, as the court will see from the diagram and photographs of the track along this seven-tenths of a mile. Surely a jury could have found as a question of fact that with all this dropping 6¾ inches to the rail, with all this turning to the side of 18 inches, with all this proceeding both on curves and on straight track, that somewhere in that course, if the watchman had been in condition, it would have functioned. This was not a short fragmentary test of a moment, but it was a long, exhaustive test of this watchman, subjecting it perhaps to every conceivable condition which all kinds of track could have subjected it to.

Opposing counsel argue that the adjustment of such a device is not an exact science, and that one adjustment will not suit all conditions of track, curve and speed, that if it is set to be too sensitive, any slight unevenness of the track might set it, that if it is set too far from the trigger, even a derailment of the front trucks might not move it. But here there was a very exhaustive and far-reaching test. It was a question for the jury whether the circumstances of this test were not sufficient to have caused it to operate if it had been in proper condition.

While some skill is required as to setting the trigger and determining the size of the frame and the length of the trigger so as to cause the air to apply with this little watchman, yet there must necessarily exist conditions under which it would always apply, and this is a question of fact and the judge submitted that question of fact to the jury.

GROUND 2, p. 13, OF DEFENDANT'S PETITION IS THAT NO SUCH DEVICE IS REQUIRED OR EVEN MENTIONED IN THE SAFETY APPLIANCE ACT, THE BOILER INSPECTION ACT, OR OTHER ACTS OR THE RULES OF THE COMMISSION AND IT IS STATED THAT THIS COURT WILL DOUBTLESS TAKE JUDICIAL COGNIZANCE OF THESE RULES AND REGULATIONS; WE SAY IT IS COVERED BY THE GENERAL WORDS "ALL PARTS AND APPURTENANCES" AND NEEDS NO FURTHER DESCRIPTION.

We say the words in the act as to safety and peril, etc., mean that as a conclusion from having the boiler and all its appurtenances in proper condition, that the boiler is therefore safe to operate and may be employed in the carrier's service without unnecessary peril, etc. These conclusions may be really called a statement of the purposes for which the act was passed.

Thus there are two distinct requirements in this act as

finally codified in Section 23 of U. S. C. A., Title 45, the first being the requirement that the entire locomotive and parts and appurtenances shall be in proper condition. The language that it is safe to operate in the service and that it may be employed without unnecessary peril, as we have stated, is a conclusion and is the same as saying, "Having required the locomotive and tender and every part and appurtenance thereof to be in proper condition, we conclude that this will make the locomotive and tender safe to operate in the service and that it may be employed without unnecessary peril to life or limb."

The next distinct proposition dealt with is to give the commission full power of making rules for inspections and of making rules for tests. This is part of the machinery adopted by the act to see that all parts of the engine are in proper condition and safe to operate.

There is nothing in the law which says how much of its power to inspect and make rules for the safety of locomotives must be exercised by the independent authority of the commission. The subject of rules is put in motion by the railway taking the initiative and submitting to the commission such rules as it proposes.

Of course, the language in the Napier case, 272 U. S. 605, must be taken to mean that the commission sets the standard for locomotives insofar as it makes requirements and rules. As to subjects which it makes no rules or requirements about, that is left to the carrier, but is still regulated by that portion of the act which says that every part and appurtenance of the locomotive must be in proper condition. In other words, as the commission itself says in its rules, the rules and requirements made by the commission are the minimum requirements. As to the other parts of the locomotive, they are governed by the maximum requirement of the enactment which says that all parts and appurtenances must be in proper condition.

In the Napier case, on page 612, the court said:

> "The fact that the Commission has not seen fit to exercise its authority to the full extent conferred has no bearing upon the construction of the Act delegating the power."

Thus we see a clear recognition that the commission may not have exercised its full power, but that it possesses power to order every detail of a locomotive. Until that power is exercised and as long as there is any device which functions as a part of the locomotive, it is covered by the language of the act itself, which, without going into detail, made a comprehensive description of all parts and appurtenances of the locomotive. This is a maximum requirement on carriers as to keeping all parts of the locomotive in proper condition.

CASES ON SAFETY APPLIANCE LAWS DISCUSSED; ALL APPLY GENERAL REQUIREMENT OF ACT AS TO PROPER OR SAFE CONDITIONS OF PARTS AND APPURTENANCES ON LOCOMOTIVE OR CAR; ALL HOLD THAT IF APPLIANCE FAILS TO FUNCTION UNDER PROPER CONDITIONS IT IS DEFECTIVE; REQUIREMENT OF PROPER CONDITION INDEPENDENT OF ACTION BY COMMISSION.

In the case of B. & O. R. R. v. Groeger, 266 U. S. 521, before quoted, the court recognized to the fullest extent that section 2 of the Boiler Inspection Act, in requiring the boiler and appurtenances (and that was an explosion case) to be in proper condition and safe to operate, etc., prescribes a sufficiently definite standard of duty; that under this section the carrier's duty to have the boiler in safe condition is absolute and continuing.

This case is a clear recognition that the engine as a whole must be in proper condition and that every part and appurtenance thereof must be in proper condition. If there had been a fusible plug on the boiler of the engine in the Groeger

case, it would have had to be in proper condition, and if it had not been and the conditions were such as to make it function had it been in proper condition and that was the proximate cause of the explosion, we contend the defendant would have been liable.

It has been repeatedly held that if the conditions are present which should make a device function under ordinary circumstances and it does not function, this brings the case under the Safety Appliance Act. The general doctrine of res ipsa loquitur in ordinary negligence cases is very different from the doctrine under the Safety Appliance Act. A much greater burden is on the employee under the common law rules of liability where he not only has to prove defective condition of appliances but the negligence of the employer. An employee may be injured by a defective instrumentality but the employer may not be negligent in respect to it. The employer may have made proper inspection and have been diligent and yet not discovered it. The defect may have been latent. But under the Safety Appliance Act, all that is required to be shown to make the employer liable is a defective condition. The law absolutely requires the appliance to be in proper condition, and this without reference to negligence.

Here there was, first, proof of the failure to function in that the brake was not applied; second, all the conditions were shown to be present which would have required the appliance to function if in proper condition; third, the judge required the jury to find that the appliance was not in proper condition before the jury could find for the plantiff; fourth, the judge required that the defective condition be the proximate cause of the injury; and, fifth, the judge put the burden of showing by a preponderance of the evidence his case on each count, on the plantiff. Record pages 144-150.

The case of McDonald v. Great Northern Rwy., 207 N. W. 194, same case 166 Minn. 87, holds generally that evidence that a train ran a mile after the air brakes were applied was evidence of a defect in the brakes.

That the duty under the Safety Appliance Act is absolute has been repeatedly held by the Supreme Court. See St. Louis, etc., Rwy. v. Taylor, 210 U. S., page 281, in which case the court, in the body of the opinion, said:

> "The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

In Minneapolis, etc., R. R. v. Gotschall, 244 U. S. 66, it was held that under the federal statutes requiring safe appliances to be furnished, the opening of an automatic coupler while the train was in motion, causing the death of a brakeman, authorized the jury to find the defendant liable. While the court used the words that the jury was authorized to infer negligence, it is clear that this was meant only in the sense of a defective construction, the court using this language:

> "The jury, under an instruction of the court, was permitted to infer negligence on the part of the company from the fact that the coupler failed to perform its function, there being no other proof of negligence. It is insisted this was error, since, as there was no other evidence of negligence on the part of the company, the instruction of the court was erroneous as, from whatever point of view looked at, it was but an application of the principle designated as res ipsa loquitur, a doctrine the unsoundness of which plainly results from the decisions in Patton v. Texas & P. R. Co., 179 U. S. 658, and Looney v. Metropolitan R. Co., 200 U. S. 480. We think the contention is without merit, because, conceding in the fullest measure the correctness of the ruling announced in the cases relied upon to the effect that negligence may not be inferred from the mere happening of an accident except under the most exceptional circum-

stances, we are of opinion such principle is here not controlling in view of the positive duty imposed by the statute upon the railroad to furnish safe appliances for the coupling of cars."

This is a clear recognition that if the appliance fails to function it is sufficient proof that the defendant has violated its positive duty to furnish a safe appliance.

In the case of Philadelphia, etc., Co. v. McKibbin, 259 Fed. 476 (Court of Appeals, Third Circuit), which was a case under the Safety Appliance Law, where a brakeman undertook to open a coupler with a lever and the same failed to open, this failure to function was held sufficient evidence of a defective condition to carry the case to the jury.

In the case of San Antonio, etc., Ry. Co. v. Wagner, 241 U. S., page 476, this court held that evidence that a coupling pin failed to drop when the cars came together is sufficient to sustain a finding that one or both couplers did not measure up to the requirement of the Safety Appliance Act requiring couplers coupling automatically by impact. The court, in concluding the opinion in this Wagner case, held that the liability grew out of a defective condition in the coupling apparatus and not out of negligence in respect thereto.

In the case of Texas, etc., Rwy. Co. v. Rigsby, 241 U. S., page 33, a switchman was injured through a defect in a hand hold forming one of the rungs of a ladder which he was descending. The court in holding that the defective condition was sufficient to show liability stated:

> "The question whether the defective condition of the ladder was due to defendant's negligence is immaterial, since the statute imposes an absolute and unqualified duty to maintain the appliance in secure condition."

In Pennsylvania R. Co. v. Jones, 300 Fed. 525, the Court of Appeals for the Sixth Circuit held that in an action under

the Safety Appliance Act for injuries to a brakeman attempting to uncouple cars, evidence that a lifting pin did not work on the first effort may be sufficient evidence of an existing defect, if it also appears that the effort was of a character and made at a time when it would have naturally been effective, save for a defect. The court in this opinion says:

> "Hence a failure of the pin to lift may indicate that the device is defective, or may indicate that the effort was made at the wrong time. We are convinced that evidence that the lifting pin did not work upon the first effort may be sufficient evidence of an existing defect, if it also appears that the effort was of a character and made at a time when it would have naturally been effective, save for a defect," etc.

In Didinger v. Pennsylvania R. Co., 39 Fed. (2) 798, the Court of Appeals of the Sixth Circuit ruled as stated in the third headnote,—"Efficiency of hand brake equipment is challenged or inefficiency established by establishing particular defect or showing failure to function when operated with due care in normal manner."

In Phila. etc., v. Auchenbach, 16 Fed. (2) 550, the Court of Appeals of the Third Circuit, in the case where a coupler was injured where the cars failed to couple by impact, as the statute required, referring to the duty to equip the cars with such appliances, said, "That duty is absolute and unqualified and contemplates the maintenance of such appliances in working condition 'at all times.' (Citing authorities.) The test of the observance of this duty is the performance of the appliances."

In the case of Phila., etc., v. Eisenhart, 280 Fed. 271, the ruling as expressed in the second headnote was as follows:

> "In action for injuries to freight conductor, sustained when cars parted on opening of couplers, the mere opening of the couplers held to warrant submission of whether

the couplers were defective, in violation of Safety Appliance Act, March 2, 1893."

In Spencer v. Seaboard Air Line, 201 N. C. 537, s. c. 160 S. E. 763, the court in the third headnote as contained in 160 S. E. 763 made the following ruling:

> "Inefficiency of hand brakes on freight car causing injury to brakeman may be shown from some particular defect, or by a failure to function when properly operated."

We have referred in our brief in opposition to granting writ of certiorari to Hines v. Smith, 275 Fed. 766 (Court of Appeals Seventh Circuit), in which an automatic bell ringer was held to be a part and an appurtenance of a locomotive and tender within the meaning of the Boiler Inspection Act, as amended, providing that railroads must equip locomotives and tenders with proper appurtenances, and in which the court used the following language:

> "It is claimed on behalf of plaintiff, and evidence supports the contention, that the automatic bell ringer was out of order and would not ring on the night of the accident, and that it had been out of order for some time. In answer thereto, defendant asserts that this act does not apply to bell ringers, and that the declaration does not charge a violation thereof. With neither position can we agree. The amendment of 1915, we think, leaves no room for doubt. Certainly a bell ringer is a 'part' or an 'appurtenance' of a 'locomotive and tender.' While a liberal construction of this statute is not necessary to justify this conclusion, it is evident that the amendment should be liberally construed and its obvious purpose effectuated."

In the case of Hines v. Smith, an employee was injured in crossing the track in front of the engine on which the automatic bell failed to ring. His claim was that the fireman was

not on the engine; that the engineer could not ring the automatic bell because it was out of condition, and that because of failure to signal him he was not warned and went upon the track and was injured. It does not appear that the Interstate Commerce Commission in its rules has ever taken cognizance of the automatic bell ringer. At least we can find nothing about it in the index to its rules. The carrier claimed that the bell ringer was not a part or appurtenance of the locomotive within the sense of the act, but the Circuit Court of Appeals for the Seventh Circuit held that it was and that its failure to function rendered the carrier liable.

In Great Northern, etc., Co. v. Donaldson, 246 U. S. 121, a locomotive engineer was killed by a boiler explosion and it was contended that the engine was not in proper condition because of the use of crown bolts having large button heads and it was contended by the defendant that the Federal boiler inspectors did not disapprove these buttons when they inspected the engine but the Supreme Court used the following language:

> "Nor can we agree with the contention of the plaintiff in error that, so long as the large button head had not been disapproved by the government inspector, such fact is conclusive of the sufficiency of the type in use. We find nothing in the Boiler Inspection Act to warrant the conclusion that there is no liability for an unsafe locomotive, in view of the provisions of section 2 of the act, because some particular feature of construction, which has been found unsafe, has not been disapproved by the Federal boiler inspector."

The effect of this decision is to give effect to that provision of the Boiler Inspection Act which makes the direct requirement that all parts and appurtenances must be in proper condition.

The case of Lehigh Valley R. Co. v. Beltz, 10 Fed (2) 74 (in which a certiorari was denied by the Supreme Court of

the United States in 270 U. S. 641), deals with the Locomotive Appliance Act in the case where the main pin of the locomotive broke causing the driving rods to fly about, punching a hole in the boiler and causing an emission of steam, hot water and fire into the cab and causing the death of the plaintiff, an employee, and it was held that the carrier was liable, and as headnote 4 states:

> "Boiler Inspection Act of Feb. 17, 1911, section 2, as amended by Act of March 4, 1915, imposes on carrier in interstate commerce an absolute duty to keep its locomotives free from defects and absolutely safe to operate; 'absolute duty' meaning one not subject to any limitation or condition, positive and not dependent, and unqualified by any considerations whatsoever."

In the case of Swinson v. Chicago, etc., Co., 294 U. S. 529 (Pamphlet No. 3, 529), this court held that the Safety Appliance Act is liberally construed so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with the act's requirements, and in that case it was held that where a brakeman was using a grab iron as a foot brace to enable him to release a hand brake and where there was evidence that the use to which it was put by the plaintiff was customary and where the grab iron gave way and was insecure, that the plaintiff could still recover, and the court even cited the case where a traveler on a highway could recover for failure to maintain proper brakes.

GROUND 3 ON PAGE 14 OF THE PETITION FOR CERTIORARI QUOTING 45 U. S. C. A. SECTION 23 CLAIMS THAT THE ACT APPLIES ONLY WHERE THE USE OF A PART OR APPURTENANCE WOULD CAUSE UNNECESSARY PERIL TO LIFE OR LIMB UNLESS IT WAS IN PROPER CONDITION AND SAFE TO OPERATE; ANSWERED.

The simple answer to this proposition is that for this appurtenance to be out of condition would cause unnecessary

peril in the event of the very disaster it was designed to prevent, that is, the derailment of the front trucks. The device being on the engine and its operation preventing a derailment by stopping the train almost instantly, it would thus, by being in proper condition, prevent unnecessary peril to life or limb. By being in improper condition and failing to function it would cause unnecessary peril to life or limb by allowing the train to be derailed. This peril is unnecessary because if the device functioned the peril would not exist.

THE NEXT GROUND IN PARAGRAPH 3, ON P. 14, PETITION FOR CERTIORARI, IS THAT SECTION 23 DOES NOT APPLY TO A DEVICE WHICH COULD NOT POSSIBLY ENDANGER THE LOCOMOTIVE BUT MIGHT POSSIBLY ADD TO THE SAFETY OF THE TRAIN IF THE PROPER CONDITIONS DEVELOPED CAUSING IT TO OPERATE; IF THIS CONTENTION WERE SOUND EVERY SAFETY DEVICE ON THE LOCOMOTIVE WOULD BE EXCLUDED FROM THE STATUTE'S REQUIREMENT OF BEING IN "PROPER CONDITION."

If this line of reasoning were adopted, every safety apparatus on the locomotive would be excluded as a part and appurtenance of it. Of course, no safety device endangers the train. Its object is to prevent disaster when some condition develops which the device could render harmless. Take as an illustration the steam safety valve which, when the pressure gets to a certain point, pops off and releases the steam. This is a safety device to prevent an explosion from excessive pressure. It could just as well be argued that the pop off valve did not endanger the train but might possibly add to the safety of it if the conditions develop which would cause it to operate and that therefore the statute did not cover it. The language of the act requires a more liberal construction. The law surely does not mean in dealing with a standard of safety and seeking to prevent unnecessary peril to life or limb to dispense with the appliances which are actually on the loco-

motive. On the contrary, it must take all the appliances of every locomotive as the standard of safety for that locomotive and must require them to be in proper condition. It is this failure to be in proper condition as to appliances actually on the locomotive which will cause unnecessary peril to life or limb.

THE NEXT CONTENTION UNDER PARAGRAPH 3, ON P. 14, OF PETITION FOR CERTIORARI IS THAT SECTION 23 APPLIES ONLY TO SUCH PARTS AS ARE REQUIRED TO BE INSPECTED IN ACCORDANCE WITH RULES ADOPTED BY THE COMMISSION UNDER THE PROVISION OF THE BOILER INSPECTION ACT AND TO MEET THE TESTS PRESCRIBED IN THE RULES AND REGULATIONS AND DOES NOT APPLY TO A DEVICE NOT REQUIRED TO BE INSPECTED OR TESTED; THIS CONTENTION FULLY ANSWERED AND THE PROVISIONS OF THE ACT, INDEPENDENTLY OF ANY ACTION OF THE COMMISSION, REQUIRE EVERY PART AND APPURTENANCE OF LOCOMOTIVE TO BE IN PROPER CONDITION.

This reasoning is not borne out by the language of the act. It does not say that only those parts must be in proper condition which are inspected or tested. The first portion of the enactment applies to the entire locomotive "and all parts and appurtenances thereof" and requires them to be in proper condition and safe to operate in the service that the same may be employed without unnecessary peril to life or limb. This portion of the act expressly applies to all parts and appurtenances without exception.

Further on the act adds an additional condition to using the locomotive in these words,—"and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected and are able to withstand such test or tests as may be prescribed in the rules and regulations provided for."

This latter language is dealing with a different subject and in a different way, but undoubtedly puts under the jurisdiction of the commission for inspection and testing every part of the locomotive. The commission may not exercise that power of inspection and testing as to all the devices and may inspect, test and require only a few, but all the parts and appurtenances on an engine are subject to their power of inspection and testing and are covered by that part of the act which requires all parts and appurtenances to be in proper condition. Being in proper condition is in no way dependent upon being tested and inspected by the commission and it has never been so held by any court.

The act itself takes in all the parts and appurtenances. If the commission has failed to make rules for inspecting every part and appurtenance, it may have failed in exercising its full power or even duty, but nevertheless the act still requires all parts and appurtenances on that locomotive to be in proper condition. Certainly if a fair construction of the act covers every part and appurtenance on the locomotive, both as to being in proper condition and as to being inspected by the commission, a mere failure by the commission either to inspect or make a rule for inspecting certain parts cannot narrow the scope of the act as to the parts required to be in proper condition.

It can well be said that the commission itself has met this situation by providing in an order that its rules and instructions "for the inspection and testing of locomotive boilers and their appurtenances as follows, be and the same are hereby approved and from and after the 1st day of July, 1911, shall be observed by each and every common carrier subject to the provisions of the act of Congress aforesaid as the minimum requirements; provided that nothing herein contained shall be construed as prohibiting any carrier from enforcing additional rules and instructions not inconsistent with the foregoing, tending to a greater degree of precaution against accidents." Pages 17 and also 25 printed rules, 1931.

To illustrate,—here is a locomotive with ten safety devices on it. The commission makes rules requiring five of those devices to be installed and inspected. It had the power to make rules which provided for the installation and inspection of every part of any locomotive. Those parts as to which rules were not made even for inspecting are still under that jurisdiction. They are allowed, however, to be on the locomotive without any positive requirement. The devices referred to in the rules constitute the minimum absolute requirement but inasmuch as the act requires all parts and appurtenances to be in proper condition, this constitutes a maximum requirement covering the devices not named in the commission's rules if they are parts and appurtenances of the engine.

Furthermore, the words "all parts and appurtenances" in the latter part (line 6) of section 23 following the words "and unless" do not have precisely the meaning which these words have in the first part of the act but are adaptable and only apply to all parts and appurtenances which are required by the rules to be inspected and have reference only to the requirement of inspection and testing. In other words, the words "and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for," apply only to all parts and appurtenances required by the rules to be inspected and tested. If the commission makes requirements as to every part of a locomotive, the second proposition in the act would cover all parts covered by the first part as to "proper condition." We say the commission's rules do require every part to be inspected. But it may not have exercised this full power. The commission may think that only certain parts and appurtenances need be inspected and tested. Therefore, this language applies in the latter part of this section to "all parts and appurtenances" required to be inspected and tested or required by the commission to be on the engine. The language in the last six lines of this section is dealing

with parts and appurtenances for different purposes from the language in the first part of the section. There is nothing in the last six lines showing that only those parts and appurtenances inspected and tested on the locomotive should be in proper condition. The last six lines are only requiring that the engine must not be used unless all parts and appurtenances required to be inspected by the rules have been inspected and tested as the rules require. The word "all" is used only in this sense and in connection with the rules for inspecting and testing. No inspecting or testing is required for any parts except those so required to be by the rules. This is not dealing with the question of whether other parts and appurtenances not required to be tested or inspected should be in proper condition.

This act has two distinct propositions in view. One is that every part and appurtenance ("all parts and appurtenances thereof") which is actually on the locomotive must be in proper condition,—otherwise that locomotive is not "safe to operate" and is not permitted to be used. The other is a further provision that that locomotive must not be used unless all parts and appurtenances thereof which are required by the rules and regulations to be inspected and tested have actually been inspected and tested.

The first proposition covers "all parts and appurtenances" on the locomotive and requires them to be in proper condition before the locomotive can be used. It is a comprehensive, all-embracing proposition.

The second proposition is a further and additional limitation on the right to use the engine, beginning with the words "and unless said locomotive and all parts and appurtenances have been inspected in accordance with the rules and are able to withstand the test prescribed by the rules," meaning, of course, all those parts and appurtenances required to be tested and inspected and covering also (under the case of Atlantic, etc., Co. v. Napier, supra) the presence of all parts required by specific order of the commission. But even if inspected and

passed under the commission's rules and it turns out the parts are not in proper condition, the carrier would still be liable.

So that we say the requirement as to a proper condition applies to everything on the engine whether inspected or not. The failure to inspect and test all the parts covered by the rules is an additional reason why the locomotive cannot be used. We have shown elsewhere in this brief, however, that the commission's rules require inspection of all parts of the locomotive which would include the watchman.

PARAGRAPH 4 ON PAGE 14 OF PETITION FOR CERTIORARI CONTENDS THAT THE BOILER INSPECTION ACT MERELY REQUIRES A CONDITION WHICH WILL PERMIT USE OF THE LOCOMOTIVE WITHOUT UNNECESSARY PERIL TO LIFE OR LIMB; WE SAY WITH THE WATCHMAN ON THE ENGINE THE PERIL FROM DERAILMENT OF FRONT TRUCKS WAS AN UNNECESSARY PERIL; IT WAS ONLY A PERIL IF THE WATCHMAN FAILED TO FUNCTION.

We answer,—this unnecessary peril refers to a relative condition, and refers to the locomotive with all parts and appurtenances in proper condition and after all parts and appurtenances, which have been required to be inspected and tested, have been inspected and tested.

PARAGRAPH 5, ON PAGE 14, OF PETITION FOR CERTIORARI CONTENDS THAT UNLESS SPECIFIED IN THE ACT THE RULES AND REGULATIONS PRESCRIBED BY THE COMMISSION FIX THE STANDARD; BUT EVEN THESE, WHILE CONSTRUCTED AS REQUIRED BY THE RULES AND REGULATIONS, MUST STILL BE KEPT IN PROPER CONDITION AND THE RULES ONLY FIX THE STANDARD SO FAR AS THEY GO; DEVICES NOT COVERED BY THE RULES ARE STILL PARTS OF THE LOCOMOTIVE AND MUST BE IN PROPER CONDITION.

The act does specify sufficiently as to parts not specified by the commission's rules. It says "all parts and appurtenances" must be kept in proper condition. A description can be by general terms. It has been held that the words "proper condition" are sufficiently definite, as see B. & O. v. Groeger, 266 U. S. 521. The rules of the commission requiring certain things on the locomotive are absolute and must be complied with as a minimum standard but if there are any other parts and appurtenances on the locomotive they must also be in proper condition and this latter is the maximum requirement.

PARAGRAPH 6, ON PAGE 15, OF THE PETITION FOR CERTIORARI ARGUES THAT IF THE DEVICE (WATCHMAN) HAD NEVER BEEN APPLIED TO THIS LOCOMOTIVE THE LOCOMOTIVE WOULD HAVE FULLY COMPLIED WITH ALL REQUIREMENTS OF FEDERAL LAW AND YET THE ACCIDENT WOULD HAVE HAPPENED; THAT WITH THE DEVICE ACTUALLY APPLIED, BUT FAILING TO SET THE BRAKES, THE LOCOMOTIVE WAS IN EXACTLY THE SAME CONDITION IT WOULD HAVE BEEN IN IF THE DEVICE HAD NEVER BEEN PLACED ON IT AND WOULD HAVE AS FULLY COMPLIED WITH ALL FEDERAL SAFETY REQUIREMENTS; THAT LIABILITY HAS BEEN IMPOSED UPON PETITIONER MERELY BECAUSE IT VAINLY ATTEMPTED TO DO MORE THAN THE LAW REQUIRED; DEFENDANT LOSES SIGHT OF THE FACT THAT IT ADDED A PART TO THAT ENGINE WHICH MADE IT A SAFER ENGINE; PRESUMABLY EMPLOYEES AND EVEN PASSENGERS RELY FOR PROTECTION UPON ALL THE EQUIPMENT PLACED ON THE ENGINES; BY ADDING THIS SAFETY APPLIANCE TO THE ENGINE THE DEFENDANT INCREASED THE STANDARD OF SAFETY FOR THAT LOCOMOTIVE; CERTAINLY THE DEVICE BECAME A PART AND APPURTENANCE OF THAT LOCOMOTIVE.

The defendant was entitled to all the credit for having a safer engine than other railroads which did not have this part and appurtenance on the engine. As has been held, the railroad has the right to make its engine largely its individual affair. It can claim over its competitors that it has a better and safer engine, but in making it better and safer it has established a standard which this law applies to in requiring "all parts and appurtenances" to be in proper condition. It is conceivable that these appliances were inducements to employees to seek employment with the defendant and rely upon its superior equipment for safety. It does not lie in the defendant's mouth to say, "I made the engine safer than I was required to do under the rules of the commission." The answer is "The safety appliance act deals with your engine as you have constructed it. What you have made in the way of a locomotive and the parts and appurtenances you have put on it you must keep in proper condition. That is your standard of safety."

THE LOCOMOTIVE IS CONSIDERED BY THIS LOCOMOTIVE APPLIANCE STATUTE AS JUST AS SAFE AS ALL THE PARTS AND APPURTENANCES ON IT MAKE IT WHEN THEY FUNCTION PROPERLY, AND THAT DEGREE OF SAFETY IS IMPERILED WHEN THEY FAIL TO FUNCTION. IN THE GENERAL SENSE OF THIS STATUTE, THE ENGINE MUST BE SAFE TO OPERATE IN THE SERVICE TO WHICH IT IS PUT. IN OTHER WORDS, WITH THE APPURTENANCES PLACED BY THE CARRIER ON THE ENGINE, THE DEGREE OF SAFETY WHICH WOULD RESULT IF THOSE APPLIANCES FUNCTIONED PROPERLY MUST BE MAINTAINED.

It is true the train could run without the air brake with a certain degree of safety, but that degree of safety would be much lower than the degree which would exist if the air brake worked. The presence of the air brake elevates the engine to a standard of safety above the hand brake standard of

safety. It is a standard established by the defendant itself which it must maintain. This is what this statute means by the language "safe to operate in the service to which the same are put" and the further language that the same may be employed in the active service of the carrier without "unnecessary peril to life or limb."

We say that under this statute safety is a relative term. The error into which opposing counsel falls grows out of failing to maintain this distinction. The engine must be safe to operate in the service to which it is put in view of the requirement that all of its appurtenances must be in proper condition. What would have been considered safe in the way of mechanical inventions fifty years ago would be considered very dangerous now. Certainly the railway company cannot complain after having erected its own standard of safety. It seems to us to be a far cry for the railway to claim that a rule of this sort would discourage the railway in putting safety appliances upon its engines.

FURTHER REPLY TO SPECIFIC CONTENTION IN DEFENDANT'S BRIEF THAT AS COMMISSION CANNOT MAKE A RULE REQUIRING SPECIFIC DEVICE WITHOUT A BASIC FINDING THAT THE USE THEREOF IS REQUIRED TO REMOVE UNNECESSARY PERIL TO LIFE OR LIMB THAT IT FOLLOWS THE VOLUNTARY USE OF A DEVICE WHICH COULD NOT ENDANGER THE OPERATION OF THE TRAIN AND THEREFORE COULD NOT CAUSE PERIL TO LIFE OR LIMB WOULD NOT BE THE USE OF A PART WITHIN THE MEANING OF THE LOCOMOTIVE ACT. WE ANSWER THAT THIS REQUIREMENT AS TO BASIC FINDING HAS NOTHING TO DO WITH THE DEFENDANT'S PUTTING DEVICE ON ENGINE; THAT THE VERY RULE OF THE COMMISSION ENCOURAGES THE CARRIER TO ADOPT RULES FOR SAFETY DEVICES; THAT THE CARRIER'S ACT IN PLACING ON ENGINE A NEW DEVICE MAY JUST AS MUCH AS THE

COMMISSION'S ORDERING A NEW DEVICE BE FOR THE PURPOSE OF REMOVING AN UNNECESSARY PERIL; THAT ANY DEVICE PLACED ON ENGINE AGAINST WHAT WOULD OTHERWISE BE A PERIL SUCH AS DERAILMENT OF FRONT TRUCKS MAKES THAT PERIL UNNECESSARY.

In the argument of opposing counsel in the brief accompanying the petition for certiorari, the case of U. S. v. B. & O., 293 U. S. 454, is quoted and counsel argue as follows: "If the commission is without power to make a rule requiring the use of a specific device without a basic finding that the use thereof is 'required to remove unnecessary peril to life or limb,' then it seems to us it necessarily follows that the voluntary use of a device which from its very nature and as shown by the undisputed testimony could not possibly endanger the operation of the train, and therefore could not possibly cause 'unnecessary peril to life or limb,' would not be the use of a part or appurtenance of the locomotive within the meaning of the Act."

We reply to this argument by saying that if the commission is without power to make a rule requiring the use of a specific device without a basic finding that the use of it is required to remove unnecessary peril, still we do not see what this has to do with the right of the railroad to put on a device of its own motion for the purpose of removing unnecessary peril. The very rule of the commission which we have quoted in this brief encourages the carrier to adopt new rules for safety devices. The commission's act in ordering a new device and the carrier's act in placing on a device of its own without a rule of the commission both equally may be to remove an unnecessary peril. Any device placed on the engine to protect against what would otherwise be a peril, such as derailment of the front trucks, would make that peril "unnecessary" if the device removed it.

It is very plain that the act is dealing with two types of appliances on engines. Until the commission acts as to every

conceivable part of the engine there will be parts of the engine upon it placed there under rules and orders of the commission as well as parts placed there by the carrier itself and tolerated and encouraged by the commission. One type of appliance is dealt with under the rules of the commission and constitutes, as we have stated, the minimum requirement. The other type, not required by the commission but encouraged by it, is put on by the carrier equally for the purpose of removing the unnecessary peril. Both must be in proper condition under the language of the act as they are both parts or appliances of the engine. Every class of appliance on the engine must be in proper condition as a maximum requirement.

THE REQUIREMENT OF A PROPER CONDITION IS COMPLETE WITHIN ITSELF. WE KNOW FROM AN INSPECTION OF THE RULES THAT THE INSPECTIONS AND TESTS ARE REQUIRED AS TO COMPARATIVELY ONLY A FEW PARTS; WOULD THIS LAW REQUIRE ONLY A FEW OF THE PARTS OF THE LOCOMOTIVE TO BE IN PROPER CONDITION AND LEAVE ALL THE OTHER PARTS, MANY OF THEM PERTAINING TO SAFETY ALONE (AND SAFETY IS THE MAIN PURPOSE OF THE STATUTE) TO BE IN IMPROPER CONDITION? IS NOT A MORE REASONABLE CONSTRUCTION OF THIS STATUTE TO SAY,—THE NUMBER OF PARTS TO BE IN PROPER CONDITION IS EVERY PART OF THE LOCOMOTIVE WHICH IN ANY WAY RELATES TO ITS SAFETY; THE COMMISSION CAN REQUIRE TO BE INSPECTED EVERY PART OF THE LOCOMOTIVE; IT CANNOT LESSEN THE NUMBER REQUIRED TO BE IN PROPER CONDITION BY MAKING ONLY A FEW PARTS SUBJECT TO INSPECTION AND TEST.

To cut down this requirement of proper condition as to all parts, the language should be clear. The well-known construction of this legislation is liberal in favor of the factor of

safety. Here it is sought to reduce the number of parts in proper condition by a complicated argument and by implication. No express language reduces the requirement of proper condition for all parts to any number less than all the parts on the engine. It is only by a process of reasoning that this is done. We say that the second requirement of inspection and testing before using as to all parts covered by the commission's rules does not leave it in the power of the commission, by inspecting and testing less than all the parts on the locomotive, to reduce the parts required to be in proper condition to less than all the parts.

Certainly where the great purpose of legislation is safety to employees and others, which is to be accomplished by having all parts and appurtenances of the engine in proper condition, a device having safety for its sole purpose should be within those parts required to be in proper condition.

If the first description covers all and the second description does not cover all, shall we not adopt a construction which will reconcile both propositions and allow each to have full effect especially in the interest of safety?

Appliances such as this watchman, having to do with safety alone, come more strongly within the reason of these safety statutes than any other parts of engines. The flanges of the front wheels if not in proper condition will derail the engine. It is a measure of safety to keep the flanges in proper condition under rules adopted for that purpose. Is it not equally within the reason of this law to keep in proper condition a safety appliance actually on the engine, and which will stop the train when the front wheels get off? Both the proper condition of the wheels and the proper condition of the safety appliance pertain to the safety of the train. Having established this standard of safety by placing these appliances on the engine, the defendant should maintain it so far as keeping all parts in proper condition will do so. Employees have a right to insist on this and even passengers and shippers may

patronize a railroad because of the character of its management and rolling stock.

UNDER SAFETY APPLIANCE STATUTES AS TO CARS, IT HAS BEEN HELD BY THIS COURT THAT REQUIREMENT OF "SECURE" HAND HOLDS AND "EFFICIENT" HAND BRAKES WAS SUFFICIENTLY DEFINITE AS A STATUTORY DUTY AND NO ACTION BY COMMISSION COULD LESSEN THE DUTY FIXED IN THE ACT; ALSO IT HAS BEEN SO HELD IN A SECOND CASE QUOTED IN DEFENDANT'S BRIEF; THESE CASES ARE THE ONLY CASES FOUND BY US IN WHICH A CONTENTION SIMILAR TO THAT OF DEFENDANT IN THIS CASE HAS BEEN MADE, AND BOTH DECISIONS WERE ADVERSE TO THAT CONTENTION.

There are a number of safety appliance requirements which depend upon exactly the same principles as this case depends. Section 11 of Vol. 45 U. S. C. A., page 59, provides that all cars must be equipped with secure sill steps and efficient hand brakes, and that all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall be equipped with secure hand holds or grab irons on their roofs at the top of such ladders.

It is provided in Section 12 of Title 45 U. S. C. A., page 63, that the number, dimensions, location, and manner of application of these appliances as designated by the Interstate Commerce Commission shall remain as the standard of equipment, unless changed by an order of the Interstate Commerce Commission to be made after full hearing, and the commission is given authority to modify or change and prescribe the standard height of drawbars and fix the time within which such modification or change shall become effective.

In the case of Illinois Central v. Williams, 242 U. S. 462,

this enactment was construed in a case where a switchman was injured in the act of mounting to the top of a box car when the handhold or grab iron placed at the top of the ladder gave way and caused him to fall. The railway claimed that the section of the act requiring secure handholds or grab irons was suspended until a date after the plaintiff's injury by order of the Interstate Commerce Commission and contended that independently of the action of the commission the provisions of the act which required cars to be equipped with secure handholds or grab irons was not in effect. The Supreme Court of the United States held that this was an independent direct statutory enactment creating an obligation on the railroad to have secure handholds or grab irons, that it required no action of the commission to put it into effect, and the court said:

> "The congressional purpose in enacting Section 2 of the act is very plain. At the time the act was passed railroad carriers had in service many box cars, requiring for their proper use secure ladders and secure handholds or grab irons on their roofs at the top of such ladders, and the purpose of this section clearly is to convert the general legal duty of exercising ordinary care to provide such safety appliances and to keep them in repair into a statutory, an absolute and imperative, duty, of making them 'secure,' and to enforce this duty by appropriately severe penalties."

In the case of W. & A. R. R. v. Meister, 37 Ga. App. 570, which is quoted by opposing counsel, another question very similar to that in this case and in the Williams case was involved. The Safety Appliance Act of 1910, in the same section in which secure sill steps were required, required all cars to be equipped with efficient hand brakes. Meister undertook to stop a car by applying the hand brake and the chains which connected the brake-rod and the brake-staff were loose and disconnected and caused the plantiff, while applying the brake, to lose his balance and fall. The contention was made in that case that inasmuch as the same law required the Interstate Commerce Commission to designate the number, dimensions,

location and manner of application of the appliance required by this law, that the plaintiff must show what rule or regulation of the Interstate Commerce Commission had been made as to the number, dimensions, location and manner of application of the brakes, and that he should show that this had not been complied with. The Georgia court quoted the Williams case in 242 U. S. 462 and held as follows:

> "We can not agree that it was necessary for the plaintiff to allege and prove the violation of any rule of the interstate commerce commission. The authority granted to that tribunal under the provisions above quoted conferred no power to dispense with a compliance with the statute as to the equipment of cars with efficient hand-brakes. Upon this point it was sufficient to allege and prove that the particular car was not so equipped. The plaintiff's right to recover depended upon proof of a violation of the statute, and not of a rule of the interstate commerce commission. While it is the duty of the interstate commerce commission not only to provide for standardization, but also to enforce the provisions of the act (see section 6), a compliance with its orders would not necessarily be a compliance with the statute. *The observance of reasonable regulations promulgated by that authority would in every case be the minimum of what the railroad should do within the law, but might not be the maximum. The commission could not require less than 'efficient hand-brakes.'* Ill. Central R. Co. v. Williams, 242 U. S. 462 (37 Sup. Ct. 128, 61 L. ed. 437)." (Italics ours.)

WATCHMAN COMPARED WITH OTHER SAFETY DEVICES WORKING AUTOMATICALLY

The little watchman was a safety appliance which put the air brake, as operated from the engine, to an additional use. There are many automatic things on the engine which operate when some condition of danger arises. In Napier v. A. C. L., 272 U. S., on page 609, the court enumerated a number of

various devices which the Interstate Commerce Commission required that railroads should equip their engines with. Take the steam gauge,—this shows automatically the pressure of steam. Take the safety valve,—this pops off automatically, as the expression is, when the steam gets to a certain pressure, and thus automatically that dangerous situation of too much pressure is relieved. Take the safety valve for the oil supply pipe, which, as its name implies, must operate under certain specified conditions. In addition to these automatic appliances, consider the fusible plug which was considered in B. & O. v. Groeger, 266 U. S. 521, which is composed of metal which should melt when the heat gets to a certain point and thus allow the steam to escape.

GENERAL CONCLUDING SUMMARY

The little watchman was a safety device which applied the air on an extension of the air line when the front trucks fell by having a frame to strike a trigger when the drop of the truck was two and one-half inches or more, or if the frame moved to one side nine inches.

The watchman's operation depended upon the simplest principles, and any jury could understand it without expert explanation. Photographs and drawings of the device appear in the record.

The wheels of the front truck of this engine dropped from a rail six and three-quarter inches high to the cross tie and ran bumping along the ties seven-tenths of a mile, including many curves and considerable straight track, the track being straight for fourteen hundred feet at one place. Also, at places the wheel marks on the ties showed the truck frame had moved to one side more than nine inches. At the end of seven-tenths of a mile the truck struck a switch, turning the engine over and killing the engineer.

Neither the engineer nor the fireman knew the front trucks were off the track until the final turnover.

The watchman had been in use by the defendant five to seven years; was in use on all passenger engines while in actual service, and on a majority of all engines on this division of defendant.

Defendant's Master Mechanic testified that if trucks got off the track they would drop the height of the rail; that the watchman would have to work if the frame on the truck came in contact with the trigger and connected with the air line.

On this occasion the device failed to function, as all the train crew testified. Had it functioned, the undisputed testimony is that the train would have stopped in six hundred feet.

The defendant took the device off the engine after the wreck and subjected it to test under the supervision of its Superintendent of Motive Power, but introduced no evidence showing the result of the examination and tests.

Although the device was used for five to seven years and on all passenger engines at the time Cox was killed, and was used in regular traffic on this occasion, defendant claimed in its answer that it was a mere experiment and not a part of the engine. The judge in his charge submitted to the jury as to whether the device was a fixed and permanent part of the engine or was a mere experiment, and whether its use as an experiment was such that the decedent as a prudent man was not authorized to have relied on its working on this occasion.

The defendant's contention that other railroads do not use the device was immaterial. The defendant had used it for years; all its passenger engines were equipped with it; it was used in its regular service and under the Locomotive Boiler Inspection Act it was a part or appurtenance of the engine and was required to be in proper condition.

No decided case has held that a carrier's duty under the Locomotive Boiler Inspection Act to have all parts and appurtenances of the locomotive and tender in proper condition applies to less than every part and appurtenance which

is actually on the engine in question, and cases are cited which apply the Locomotive Boiler Inspection Act to such automatic appliances as automatic bell ringers, which are not specified in any rule of the Interstate Commerce Commission. Various cases are examined in this brief.

As to defendant's contention that this appliance did not endanger the locomotive, we say that all the cases recognize that a part or appurtenance of the engine may be a safety device which prevents some dangerous condition from leading to disaster, such as the pop-off valve of a locomotive which releases steam pressure when the engine's pressure gets above the safety limit.

The question of whether the condition existed which would necessarily have made this equipment function was a question for the jury. The judge told the jury that the defendant would not be liable on account of the equipment unless its failure to function was because of its not being in proper condition, and further told the jury that there would be no liability unless the failure to function was not only the result of the equipment's being out of condition but also the failure to function was the proximate cause of the disaster.

There is no complaint of any error in the case except the submission to the jury of the condition of the little watchman under the Locomotive Boiler Inspection Act.

As to defendant's contention that if it had not put this device on the engine there would have been no liability, we say that the defendant is bound by the equipment which it places on its own engine; that the Supreme Court has held that each carrier can determine for itself the type of engine and equipment which it will use; that the defendant had thus elevated itself to a standard of safety with this device on the engine which it must maintain by keeping the device in proper condition.

Defendant contends that because the device was designed to prevent trouble it did not endanger the train and did not,

therefore, come under the Safety Appliance Act, which only covers those things endangering the safety of the train. Our answer is, this contention would eliminate every safety device from the Locomotive Inspection Act; that it would eliminate the pop-off valve which automatically releases steam when it gets to a dangerous pressure; that safety devices are encouraged and are parts and appurtenances of the engine which must be kept in proper condition.

This appliance is but an extension of the use of the air line and brake, and defendant is as much liable if this appurtenance is not in proper condition as if the air brake in the hands of the engineer should be out of condition.

Many appliances on the engine which must be kept in proper condition depend for their operation upon the existence of some condition, such as the steam gauge which depends upon steam pressure, the water gauge which shows how high the water is in the engine, and other like cases, and the question of whether the facts in this case would have made the watchman function if in proper condition was for the jury.

The watchman could have been out of condition in many ways; the air line could have been obstructed; the valve might have stuck; the trigger may have been broken or bent; the frame might have been broken or bent; and any of these things would have caused it to fail to function where the facts were such that had it been in proper condition it would have functioned.

In answer to the defendant's contention that the Locomotive Act does not require a part of the engine to be in proper condition unless the Commission has taken some action in respect to it or specifically requires it to be inspected, we say: The locomotive Act contains two distinct requirements, the first being that it is unlawful to use a locomotive unless all parts and appurtenances thereof are in proper condition, and the second being (as we contend) that it shall be unlawful to use a locomotive unless all parts and appurtenances thereof which are

required by the Commission's rules to be inspected and tested, shall be so inspected and tested before being used. These requirements are separate and independent of each other.

The Interstate Commerce Commission, having been given power to pass rules for inspection and testing of locomotives, has provided in its rules that its requirements for inspection are only the minimum requirements under the statute and that its rules do not prohibit any carrier from enforcing additional rules "tending to a greater degree of precaution against accidents."

The rules of the Commission further require the carrier to inspect all parts of locomotives.

The rules of the Commission constitute the minimum requirements, and the provision of the Act itself that all parts and appurtenances be in proper condition constitute the maximum requirement.

Respectfully submitted,

REUBEN R. ARNOLD,
B. P. GAMBRELL,
T. D. ARNOLD,
Attorneys for Respondent.